

DOCKET FILE COPY ORIGINAL

ORIGINAL

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D. C. 20554

RECEIVED

FEB 13 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

Assessment and Collection of )  
Regulatory Fees for Fiscal )  
Year 1995 )

MD DOCKET NO. 95-3

TO: The Commission

**JOINT COMMENTS**

Withers Broadcasting Company of Texas, licensee of UHF Television Broadcast Station KAVU-TV, Victoria, Texas (Withers), VictoriaVision, Inc., licensee of UHF Television Broadcast Station KVCT, Victoria, Texas (VVI), and South Jersey Radio, Inc., licensee of UHF Television Station WMGM-TV, Wildwood, New Jersey (South Jersey), by their attorney, hereby respectfully submit Joint Comments in response to the **Notice of Proposed Rulemaking** in the above-captioned matter, FCC 95-14, released January 12, 1995. In support whereof, the following is shown:

**Introduction**

1. Withers sought reconsideration of the Commission's Order in **Implementation of Section 9 of the Communications Act ("FY 1994 Order")**, 9 FCC Rcd 5333 (1994). Withers,

No. of Copies rec'd  
List ABCDE

019

South Jersey and VVI's predecessor, KVCT, Inc., filed petitions pursuant to 47 U.S.C. §159(g) for reduction of their regulatory fees to the level of stations in the "remaining markets". To date, those petitions have not been acted upon by the Commission.

2. The purpose of this filing is to place before the Commission quirks in the proposed rules and procedures for Fiscal Year 1995 which are fundamentally unfair to Withers, VVI and South Jersey and other broadcasters who operate small market television stations, which, under the proposed regulations, would be treated as large market stations.

**Factual Statement**

3. Withers, VVI and South Jersey are similarly situated licensees in that they operate television stations in what used to be known as "non-ADI" markets, where stations operate in small, single county markets some distance from the principal city (or cities) of the ADI, and generally do not provide even Grade B service to the principal city (or cities) of the ADI. A list of all stations nationwide as compiled by the undersigned utilizing Warren Publishing's **Television & Cable Factbook, Volume No. 62, 1994 Edition**, is attached hereto as Exhibit A.

4. Warren Publishing's compilation of market-size is based on old data. Since **Volume No. 62** was published, Arbitron has gone out of business as far as television ratings are concerned. Arbitron's main competitor, the Nielsen Station Index (NSI), is the only true and current source for current information as to markets (Nielsen's equivalent to an Arbitron ADI is the "Dominant Market Area" (DMA). Since the Arbitron data is by its terms obsolete, it is arbitrary, capricious and irrational for the Commission to base its imposition by market size of "regulatory fees" on broadcasters based on them.

5. For example, in the case of Withers, Arbitron's ratings data found in **Volume No. 62** shows Victoria, Texas as a part of the Arbitron-defined "San Antonio-Victoria ADI", despite the fact that neither station KAVU nor station KVCT even come close to providing Grade B service to the San Antonio metropolitan area. On the contrary, Nielsen defines Victoria as a separate DMA; indeed, Victoria is one of America's smallest DMA's, DMA No. 207. Similar markets in size to Victoria are Zanesville, Ohio and Twin Falls, Idaho. Broadcasters in those markets, because of their apparent good fortune to have been treated by Arbitron as a separate

market, will be paying the smallest fee for television broadcasters, \$4,775.00. However, because of Arbitron's arbitrariness (as detailed in KAVU and KVCT's separate reconsideration petitions), those stations under the proposed rules would be forced to pay a fee for stations in markets 26-50, or \$11,450.00. Thus, the Commission's rules as written propose to unfairly deprive Withers and VVI of \$6,675.00 each by administrative fiat failing to have any resemblance to due process of law.

6. In the case of South Jersey, it had the misfortune of Arbitron refusing to grant it a "home county" ADI. South Jersey's WMGM-TV, New Jersey's only network affiliated television station, is forced by channel spacing requirements and the NBC Television Network's contractual requirements in Philadelphia to serve only the southeastern three counties of New Jersey and portions of lower Delaware. Wildwood is 68 air miles from the Philadelphia reference point. WMGM-TV's Grade B contour falls roughly 30 miles short of Philadelphia. Yet, the Commission's proposed regime for regulatory fees would have WMGM-TV pay \$17,150.00, by virtue of Philadelphia's ranking as the number 4 Arbitron ADI, rather than the \$4,775.00 for smaller

television market which WMGM-TV actually serves--a difference of \$12,375.00.

7. There is no justification provided in the **Notice of Proposed Rulemaking** for the disparate treatment for stations KAVU, KVCT and WMGM-TV, and for the other small market television stations listed in Appendix A. It is well settled that, for the Commission to enact proposed rules, they may not be arbitrary, capricious and irrational, and they must be based upon substantial evidence upon the whole record. The Commission's proposal (or lack thereof) regarding certain small market television stations fails to meet any legal or moral standards.

**Proposed Remedy**

8. It is to be noted that in 47 C.F.R. §76.53, the Commission maintains the reference coordinates of the cities of license of television stations. The Commission can develop an easy rule to exempt small market stations in the postures of KAVU, KVCT and WMGM-TV from having to pay fees intended for larger market stations. That rule would be this: if the television station can truthfully certify that its Grade B contour does not encompass the reference coordinate for the largest city in its Arbitron ADI or

Nielsen DMA television market, then it will pay a regulatory fee at the rate prescribed for "remaining markets". Additionally, the Commission should adopt a rule that provides if the Nielsen Station Index recognizes a separate television market which is 101st or smaller for a television station, it will pay a regulatory fee at the rate prescribed for "remaining markets".

Respectfully submitted,

**WITHERS BROADCASTING COMPANY OF TEXAS  
VICTORIAVISION, INC.  
SOUTH JERSEY RADIO, INC.**

By 

Dennis J. Kelly  
(D. C. Bar #292631)  
Their Attorney

CORDON AND KELLY  
Post Office Box 6648  
Annapolis, MD 21401

February 13, 1995

## APPENDIX A

The following is a list of non-"satellite" stations licensed to small communities within the top 100 television ADI's determined by Arbitron and reported in the **1994 TV & Cable Factbook**. In each case, the Grade B contour of the affected station does not encompass any part of the central city or cities of the ADI in question.

<u>Station</u>	<u>City of License</u>	<u>ADI</u>
KMOH-TV	Kingman, Arizona	Phoenix
KUSK	Prescott, Arizona	Phoenix
KHIZ	Barstow, California	Los Angeles
KFTY	Santa Rosa, California	San Francisco
KSTV-TV	Ventura, California	Los Angeles
KSBS-TV	Steamboat Springs, CO	Denver
WHAI-TV	Bridgeport, Connecticut	New York
WFGX	Fort Walton Beach, FL	Mobile-Pensacola
WOGX	Ocala, Florida	Orlando-Daytona Bch
WEYS	Key West, Florida	Miami
WNEG-TV	Toccoa, Georgia	Greenville-Spartanb.
WWTO-TV	LaSalle, Illinois	Chicago
WCEE-TV	Mt. Vernon, Illinois	St. Louis
KJMH	Burlington, Iowa	Davenport-Rock Is.
WLJC	Beattyville, Kentucky	Lexington
WYMT-TV	Hazard, Kentucky	Lexington
WGOT	Merrimack, New Hampshire	Boston
WWAC-TV	Atlantic City, NJ	Philadelphia
WMGM-TV	Wildwood, NJ	Philadelphia
KHFT	Hobbs, New Mexico	Albuquerque
KRPV	Roswell, New Mexico	Albuquerque
WTZA	Kingston, New York	New York
WFAY	Fayetteville, NC	Raleigh-Durham
WHKY-TV	Hickory, NC	Charlotte
WRMY	Rocky Mount, NC	Raleigh-Durham
WOAC	Canton, Ohio	Cleveland
WMFD-TV	Mansfield, Ohio	Cleveland
WGGN-TV	Sandusky, Ohio	Cleveland
WBPH-TV	Bethlehem, Pennsylvania	Philadelphia
WOST-TV	Block Island, Rhode Is.	Providence
WKZX	Cookeville, Tennessee	Nashville
WINT-TV	Crossville, Tennessee	Knoxville

KBTX-TV	Bryan, Texas	Waco-Temple
KVAW-TV	Eagle Pass, Texas	San Antonio
KAVU-TV	Victoria, Texas	San Antonio
KVCT	Victoria, Texas	San Antonio
KCWT	Wenatchee, Washington	Seattle-Tacoma